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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

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20 UNITED STATES OF AMERICA,
21 Plaintiff,
22 v.
23
24 ELIJAH COOPER,
25 Defendant.

26 Case No. 13 Cr. 693 SI

27 NOTICE OF MOTION AND MOTION TO
28 DISMISS SECOND SUPERSEDING
INDICTMENT; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT

Date: April 21, 2015
Time: 3:00 p.m.

Before the Honorable Susan Illston
United States District Judge

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20 TO: MELINDA HAAG, UNITED STATES ATTORNEY and BENJAMIN TOLKOFF,
21 BRIGID MARTIN, and MARC WOLF, ASSISTANT UNITED STATES ATTORNEYS
22 PLEASE TAKE NOTICE that, subject to the Court's approval, on April 21, 2015 at 3:00
23 p.m., or as soon thereafter as he may be heard, defendant Elijah Cooper, by and through his
24 counsel, will and does hereby move this Court for an Order dismissing this case based on the
25 Government's intentional refusal to produce exculpatory evidence, as ordered by this Court and
26 as required by the Fifth Amendment to the United States Constitution.

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MOTION

Defendant Elijah Cooper, by and through his counsel, pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution, the Federal Rules of Criminal Procedure, this Court's supervisory powers, and all other applicable statutes, case law and local rules, hereby moves this Court for an order dismissing the second superseding indictment.

This motion is based upon the instant motion and notice of motion, the attached statement of facts and memorandum of points and authorities, the Declaration of Ethan A. Balogh filed April 10, 2015, and any and all other materials that may come to this Court's attention at the time of the hearing on this motion.

Respectfully submitted,

DATED: April 10, 2015

COLEMAN, BALOGH & SCOTT LLP

/s/ E A Balogh
By: ETHAN A. BALOGH
235 Montgomery Street, Suite 1070
San Francisco, CA 94104
Direct: (415) 391-0441

Attorneys for Defendant
ELIJAH COOPER

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

3 Defendant Elijah Cooper respectfully submits the following memorandum of law in
4 support of his motion to dismiss this case due to a flagrant violation of both this Court's
5 discovery Order and *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to *United States v.*
6 *Chapman*, 524 F.3d 1073 (9th Cir. 2008), dismissal with prejudice is the appropriate remedy for
7 the flagrant *Brady* violation. At a minimum, the Court should require immediate production of
8 *Brady* materials, and should sanction the Government's refusal to abide the Court's February 27,
9 2015 Order requiring the production of all exculpatory materials by April 7, 2015. Absent
10 dismissal, sanctions should include, at a minimum, instructing the petit jury that the Government
11 committed discovery misconduct by withholding exculpatory evidence from Mr. Cooper.

The violations at hand stem from the Government’s refusal to provide evidence regarding a series of undercover controlled purchases from Anthony Knight in which Mr. Cooper was not involved. Because the Government asserts that Mr. Cooper served as Knight’s cocaine supplier, including on February 5, 2013, evidence showing that Knight engaged in additional sales of cocaine to the Government’s agents between June 2012 and January 2013—*viz.*, during this same investigation—without Mr. Cooper makes it more likely that he did *not* serve as Knight’s supplier on February 5, 2013, as charged by the grand jury. Nevertheless, the Government has refused to provide this evidence, despite Mr. Cooper’s direct requests and despite this Court’s Order compelling its production. As recited by the Government, this evidence is irrelevant and it has intentionally withheld it.

22 The proper manner for the Government to challenge the admissibility of this evidence on
23 relevance grounds is to produce it, as requested and compelled by this Court’s Order, and then to
24 move this Court for an Order seeking its exclusion. Instead, the Government—which plainly
25 never intended to produce this information in the first place—seeks to “win” the exclusion of this
26 evidence by withholding it from Mr. Cooper. This conduct constitutes a flagrant violation of this
27 Court’s discovery Order and *Brady*.

28 | ////

What additional exculpatory materials the Government continues to withhold are a mystery and cause for genuine concern.

II. Background

4 The Government's recalcitrance to provide information regarding this investigation is so
5 well established, Mr. Cooper need only cite to this Court's Orders recounting portions of it. ECF
6 Nos. 87, 117. Although this Court ordered the Government to provide any and all exculpatory to
7 Mr. Cooper on or before April 7, when Mr. Cooper identified specific exculpatory information
8 covered by that Order and otherwise discoverable “[u]pon a defendant’s request,” *see* Fed. R.
9 Crim. P. 16, the Government refused to provide it.

10 The material at issue involves a witness referred to “CW 2” or “CS”. In brief, the
11 Government began investigating Anthony Knight in the summer of 2012. According to its first
12 pen register application, filed June 20, 2012, on an unknown date in 2012—although not
13 authorized by the Court, the Government redacted the specific date from the discovery it
14 produced—CW2 made monitored calls to Knight and arranged for and successfully purchased
15 crack cocaine from Knight in a video-recorded transaction. *See* ECF Nos. 106-107 (Sealed
16 Declaration of Ethan A. Balogh Filed January 16, 2015), Ex. T.

17 The Government later revealed that:

18 CW-2 made two controlled purchases of crack cocaine from Knight prior to
19 CW-1 becoming involved in the investigation. However, some issues
20 impacting CW-2's credibility arose during the course of the investigation and
CW-2's cooperation was terminated. CW-1 was then brought into the
investigation to take CW-2's place.

²¹ See ECF No. 44 (Sealed Balogh Declaration Filed June 6, 2014), Ex. H, ¶ 114.

22 Thereafter, CW-1 then made *at least* three controlled and recorded purchases of crack
23 cocaine from Knight, on October 18, 2012, January 8, 2013, and February 5, 2013. *See*
24 *id.*, Ex. H, ¶¶ 22-74.¹

1 As the Court is aware in this case, the Government alleges that Mr. "Cooper acted
 2 as Knight's source of supply[,"] *id.*, Ex. M, ¶ 22, for the February 5, 2013 controlled buy.
 3 The Government even related Knight's subsequently filed case to this one based on that
 4 allegation. *See* ECF Nos. 18 ("It is alleged that Mr. Cooper supplied the cocaine base that
 5 Mr. Knight sold to a government cooperator on February 5, 2013") & 19 (Order relating
 6 cases).

7 Plainly, Mr. Cooper's lack of involvement in Knight's serial (and recorded) sales
 8 of cocaine tends to make Mr. Cooper's role as Knight's alleged supplier in the February 5
 9 sale less likely. *See* Fed. R. Evid. 401. But the Government refuses to provide to Mr.
 10 Cooper its evidence of the sales involving CW-2.

11 As the Government explains it:

12 As stated in the affidavit, CW2 conducted controlled purchases from Anthony
 13 Knight in 2012, before the dates of the charged crimes in the Second Superseding
 14 Indictment. To our knowledge, those controlled purchases did not involve your
 15 client. The controlled purchases have not been charged in the Second
 16 Superseding Indictment and are not the basis for probable cause for any
 17 instrument that resulted in the seizure of evidence in the case against your client.
 18 Those transactions were mentioned in the wiretap affidavit only for the purpose of
 19 demonstrating necessity for the wiretap. Specifically, they were mentioned
 20 because the failed relationship between the FBI and CW2 demonstrated the
 21 difficulty of using cooperating witnesses in this case. Were this information
 22 divulged, I have concern that it would expose CW2 to possible retaliation and
 23 violence.

24 Your stated basis for the disclosure is that you believe it is exculpatory. In
 25 essence, I understand your argument to be as follows: Anthony Knight made
 26 several deals where Elijah Cooper was not the source of supply; therefore Elijah
 27 Cooper is less likely to have been the source of supply for the charged crimes. I
 28 simply disagree with this line of reasoning. It is clear from the evidence you have
 been given that Anthony Knight was supplied by different people at different
 times throughout the investigation. I disagree that it is more or less likely to have
 been your client on some occasions simply because it was not your client on
 others.

Balogh Decl. Ex. A.

The Government's reasoning is spurious. For one, the evidence is clearly exculpatory for
 the reasons stated. The notion that the Government can deny this truth only serves to prove it

¹(...continued)
 this motion.

1 cannot recognize exculpatory evidence at all. While the Government is free to argue Knight had
 2 more than one source of supply, what it cannot do is withhold the evidence of Knight's other
 3 conduct to avoid its introduction at trial.

4 As for the second claim—exposure of CW-2—the Government still has not disclosed
 5 CW-1's identity to Mr. Cooper, even though she is “a percipient witness” in this case. *See id.*
 6 Rather, disclosure of the hidden reports, audio and video would only conform to the same
 7 disclosures of CW-1's identity: none at this time. And, of course, to meet its obligations to
 8 produce exculpatory evidence, the Government could have disclosed the information about CW-
 9 2 pursuant to an Attorneys' Only Protective Order.

10 III. Argument

11 In *Chapman*, the Ninth Circuit affirmed the dismissal of an indictment with prejudice
 12 based on the Government's flagrant *Brady* violations. The Ninth Circuit first explained:

13 An indictment may be dismissed with prejudice under either of two
 14 theories. First, a district court may dismiss an indictment on the ground of
 15 outrageous government conduct if the conduct amounts to a due process
 violation. Second, if the conduct does not rise to the level of a due process
 violation, the court may nonetheless dismiss under its supervisory powers.

16 *Chapman*, 524 F.3d at 1084 (citations and footnote omitted). With respect to the second theory,
 17 the Court held a:

18 district court may exercise its supervisory power to implement a remedy
 19 for the violation of a recognized statutory or constitutional right; to
 20 preserve judicial integrity by ensuring that a conviction rests on
 appropriate considerations validly before a jury; and to deter future illegal
 conduct.

21 *Id.* at 1085 (citation and internal quotation marks omitted). Furthermore, as to the supervisory
 22 power theory, dismissal is only appropriate if the Governmental misconduct is “flagrant.” *Id.* at
 23 1085.

24 In *Chapman*, the Ninth Circuit affirmed the district court's dismissal of the indictment
 25 under its supervisory powers.² In doing so, the Ninth Circuit rejected the Government's
 26

27 ²In addition to relying upon its supervisory powers, the district court in *Chapman* also
 28 (continued...)

1 argument that the *Brady* violations were not “flagrant.” The Government argued that the
2 flagrancy standard requires intentional misconduct, but the Ninth Circuit disagreed, holding that
3 “[w]e have never suggested . . . that ‘flagrant misbehavior’ does not embrace reckless disregard
4 for the prosecution’s constitutional obligations.” *Id.* at 1085. The Ninth Circuit agreed with the
5 district court that the Government’s failure to comply with *Brady* was reckless and therefore
6 “flagrant,” and “note[d] as particularly relevant the fact that the [G]overnment received several
7 indications, both before and during trial, that there were problems with its discovery production
8 and yet it did nothing to ensure that it had provided full disclosure until the trial court insisted it
9 produce verification of such after numerous complaints from the defense.” *Id.* at 1085.

In this case, the Government has refused to produce completely evidence regarding Anthony Knight's known sales of cocaine during this same investigation in which Mr. Cooper was not his supplier. This evidence is exculpatory, as it tends to show that Mr. Cooper was *not* Knight's supplier. Put another way, had the evidence shown Mr. Cooper was involved in those other sales, the Government certainly would have argued the evidence was inculpatory and tended to show that Mr. Cooper supplied Knight on February 5, as alleged in each of the three indictments. The absence of that evidence is thus necessarily exculpatory, because it tends to show that Mr. Cooper did not supply Knight on February 5.

Even though the Government was ordered to produce all exculpatory evidence by April 7, 2015, *see* ECF No. 115, the Government refused to provide it, claiming these materials “are not relevant.” A more intentional disregard for the Government’s responsibility to provide exculpatory evidence is hard to imagine. That it would proceed in this way on the heels of a direct Order to produce *all exculpatory* evidence—not just *Brady* evidence—by April 7, only heightens the need for correction in this case.

Indeed, the Government has repeatedly been put on notice of Mr. Cooper's demand for discovery compliance, *see* ECF Nos. 32, 71, & 93, and in July 2014, the Government represented to the Court that it had honored Mr. Cooper's discovery rights and withheld nothing from him. *See* ECF No. 93 at 34. Putting aside that the Government's April 7, 2015 letter—under the guise of producing Rule 16-1 summaries, exculpatory evidence, and Rule 404(b) evidence as directed by the Court—contained reams of inculpatory evidence about Henry Tobias that have nothing to do with the Court's Order, *see* Balogh Decl. Ex. A, the Government's treatment of its obligations to provide exculpatory evidence presents serious concerns. In short, the Government has ignored the obligations imposed by *Brady*, and ignored this Court's directive to produce all exculpatory evidence by April 7, evincing a disregard for these necessary predicates to any fair trial. As in *Chapman*, the discovery violations in this case, which involve important exculpatory evidence, are flagrant. Like *Chapman*, dismissal with prejudice will deter such future misconduct, will preserve judicial integrity, and will provide the effective remedy for the constitutional violations in this case. At a minimum, the Court should sanction the Government's conduct, including by informing the jury of the Government's discovery abuse.

IV. Conclusion

For the reasons set forth above, Mr. Cooper respectfully moves the Court to dismiss the second superseding indictment.

Respectfully submitted,

DATED: April 10, 2015

COLEMAN, BALOGH & SCOTT LLP

/s/ *E A Balogh*
 By: ETHAN A. BALOGH
 235 Montgomery Street, Suite 1070
 San Francisco, CA 94104
 Direct: (415) 391-0441

Attorneys for Defendant
 ELIJAH COOPER

1 **PROOF OF SERVICE**

2 I, Ethan A. Balogh, certify that on April 10, 2015, I served all parties in this matter by
3 causing the preceding pleading to be filed electronically, as set forth by Local Rule 5-1.

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5 Dated: April 10, 2015

/s/ E A Balogh
ETHAN A. BALOGH

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